Supreme Court, U.S.
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Case No. 88-1737

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ELMER R. BARBEE

PETITIONER

VS

THE UNITED STATES

RESPONDENT

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Elmer R. Barbee

Attorney, Pro Se

Route 7, Box 345

Manchester, Kentucky 40962

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(606) 598-6151 (W)

EDITOR'S NOTE:

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INDEX

Page

Table of Authorities.....ii

Statement of Facts.....1

Conclusions.....ii

Certificate of Service.....15

APPENDIX A.....A-1

APPENDIX B.....B-1

APPENDIX C.....C-1

APPENDIX D.....D-1

TABLE OF AUTHORITIES

RULES

RULES OF THE SUPREME COURT, Rule 22-6

CASES

UNITED STATES VS FAUSTO.

108 S. Ct. 668 (1988)

STATUTES

5 USC 5596

32 USC 105

SECRETARIAL REGULATIONS

Army Reg. 20-1 (15 June 1978)

Army Reg. 20-1 (15 January 1980)

Army Reg. 20-1 (16 September 1986)

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Elmer R. Barbee respectfully submits in compliance with Rule 22.6, this supplemental brief and presents interviewing material that was not available at the time of Petitioner's last filing.

STATEMENTS OF FACTS

On 30 May 1989, COL Marcia Rinkel of the Office of the Inspector General, mailed Petitioner the enclosed letter. (APPENDIX A) On 8 June 1989 (APPENDIX B), Petitioner replied to that letter and stated that the proposed adverse action that violated AR 20-1 was presented to Petitioner on 22 February 1980, therefore, violating the 15 January 1980 version of AR 20-1. Petitioner

respectfully requested that the Office of the Inspector General provide a corrected copy of the 7 March 1989 letter reflecting the appropriate provisions of AR 20-1, dated 15 January 1980. No response was received.

Upon telephonic follow-up, Petitioner was informed by COL Herbert Williams, Legal Advisor, Office of the Inspector General (TIG), that legal representatives from National Guard Bureau, the Department of the Army, (The Judge Advocate General, TJAG), and the Department of Justice had met in his office and that as a result of that meeting, the 30 May 1989 letter was prepared. COL Williams stated that all future correspondence would be reviewed by Major Cathy Cates, TJAG, prior to the submission of any responses from the office of the Inspector General.

On 18 June 1989, Petitioner submitted an Inspector General Action Request (IGAR) and provided documented evidence that for the past 9 years the Army National Guard and all other concerned agencies had considered both the 15 June 1978 and the 15 January 1980 versions of AR 20-1 as having been applicable to the Inspector General Investigation conducted in October and November 1979 and to the subsequent adverse action initiated against Petitioner on 22 February 1980. (APPENDIX C)

On 27 June 1989, Petitioner again spoke with COL Herbert Williams, TIG, and pointed out that on page i of the 15 June 1978 version of AR 20-1, it states in reference to the use of this regulation that:

"It provides policies, procedures, and guidance for conduct of The

Inspector General program for the Active Army, Army Reserves, and the Army National Guard. Local supplementation of this regulation is permitted but is not required. If supplements are issued, Army Staff agencies and major Army Commands will furnish one copy to HQDA (DAIG-ZX) WASH D.C. 20310; other commands will furnish one copy of each to the next higher headquarters."

Since COL Rinkel's letter of 30 May 1989 (APPENDIX A) stated that no NGB Publications (supplements) existed between 15 June 1978 and 15 February 1980 as to the applicability of AR 20-1, then those policies, procedures and guidlines as issued the National Guard by the Secretary of the Army were in force as presented.

COL Rinkel's letter of 30 May 1989 also stated that:

> "The June 15, 1978 version of AR 20-1 had a provision in paragraph 5-1b which said 'Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard regulations or other National Guard publications.'"

This quote was taken out of context in that CHAPTER 5 of the 15 June 1978 version of AR 20-1 is entitled "INSPECTOR GENERAL INSPECTION OF THE ARMY NATIONAL GUARD AND ARMY RESERVE." This quote can be found today in paragraph 6-6c of AR 20-1, dated 16 September 1986, and still only applies to inspections. Chapter 5 of the 15 June 1978 version of AR 20-1 did not cover Inspector General Investigations

except under paragraph 5-4h, Inpsection Objectives: This paragraph provides that:

> "When conducting general inspections of ARNG and the USAR, Inspectors General will determine the overall state of readiness and training to include whether --
>
> h. A procedure has been established and is being used to receive, make inquiry into and respond to all Inspector General action requests."

An inspection requirement of The Inspector General was to assure the ARNG had a procedure established to respond to all IGAR's. In that no supplemental changes were submitted to NGB by the North Carolina Army National Guard, AR 20-1 dated 15 June 1978 was effective as issued by the Secretary of the Army.

This was the regulation in effect and utilized by the National Guard and Charles R. Neilsen, NCARNG, IG who received Petitioner's complaints as rendered on DA Form 1559 (See APPENDIX C). CHAPTER 4, "INVESTIGATIONS AND INQUIRIES" covered investigations and in that chapter there were no exclusions for the National Guard or Army Reserve.

Both the 15 June 1978 and 15 January 1980 versions of AR 20-1 contained under paragraphs 1-2 and 1-3 respectively, "Statutory Authority," the following:

> "Title 32 United States Code, Section 105 provides for the Insepction of the Army National Guard (ARNG) and for conducting <u>investigations</u> of the ARNG on matters having Federal Concern."

The investigation conducted was a matter of Federal concern in that all parties

involved were technicians, therefore, employees of the Department of the Army and of the United States. Federal funds, time and facilities were involved.

In both the 15 June 1978 and 15 January 1980 versions of AR 20-1, paragraphs 1-4c and 1-5c respectively, "Status of Inspectors General," it states:

> "Officers detailed as Inspectors General will not be appointed as Investigating officers under Articles 32 and 138, UCMJ; under AR 15-6; or under any other regulation or directive providing for the appointment of investigating officers, members of adminstrative boards, or members of courts-martial. Inspectors General will not be given other similar duties which may subsequently disqualify

them from making impartial investigations or inquiries into any function or any aspect of the activities of the HQDA staff agency or command to which they are assigned."

COL Charles Neilsen was school trained as an Inspector General by the Department of the Army; he wore the Inspector General insignia; he was allowed by regulation to administer oaths before taking sworn testimony; and he was detailed an Inspector General by military TO&E assignment with the National Guard. Even though other types of investigations were available for use by the head of the agency, this Inspector General was chosen to conduct an Inspectors General Investigation. COL Charles Neilsen was prohibited by regulation from conducting any other investigation except for an Inspector

General Investigation in accordance with AR 20-1 dated 15 June 1978.

On 11 July 1989, Petitioner received from COL Marcia Rinkel, TIG, a letter (APPENDIX D) dated 5 July 1989. Telephonic communication with COL Herbert Williams revealed that this was the response to Petitioner's 8 June and 18 June 1989, Inspector General Action Request. This was to be the only response rendered at the advice of Mr. John S. Groat of the Department of Justice. This letter states that no further substantive response will be provided, even though INSPECTOR GENERAL ACTIVITIES AND PROCEDURES dated 16 September 1986 states in paragraph 1-5h that the "TIG will--

h. Maintain a system under the law, regulations, and the requirements of <u>due process</u>, through which Service members

and others may request aid in resolving problems related to the Army, without fear of compromise, reprisal, or unnecessary disclosure of information. Also, the IG will establish a procedure to monitor each case until it is resolved."

CONCLUSIONS

The 15 June 1979 version of AR 20-1 was utilized by the National Guard to conduct the October-November 1979 Inspector General Investigation as evidenced in sworn testimony given by COL Charles R. Neilsen, NCARNG, Inspector General. (provided in APPENDIX C)

The Office of the Special Counsel (OSC) is the only other agency that has had access to all the pertinent information and that has investigated

all of the events from October 1979 through Petitioner's appeal denial by the Adjutant General in November 1980. The OSC's investigation found that the National Guard had violated both the CSRA of 1978 and AR 20-1. In 1984, the OSC charged Petitioner's technician supervisor with a prohibited personnel action; Denial of Appeal Rights (Reprisal Action). COL Rinkel's 7 March 1989 letter explaining the acts of retribution that violated the 15 June 1978 version of AR 20-1 is still valid.

In 1981 and 1982, Petitioner attempted through U.S. Sentators and Congressmen to have an uncensored version of the Inspector General Investigation reviewed in an attempt to resolve this issue informally or to obtain the necessary information required for judicial review in a court of law. The agency continually utilized

AR 20-1 as the authority to deny these requests (See APPENDIX C). To state now, 9 years after the fact, that AR 20-1 does not apply is arbitrary and capricious application of Inspector General regulations by the agency. The 30 May 1989 letter (APPENDIX A) is only an attempt by the agency to provide a defense for the United States Government.

The recommendation by Mr. John S. Groat, Department of Justice, that the Office of the Inspector General provide no further substantive responses to Petitioner's Inspector General Action Request is tantamount to an "obstruction of governmental administration" and is an attempt to deny Petitioner due process before the Supreme Court.

The 7 March 1989 letter from the Office of the Inspector General clearly stated that the head of the agency

proposing to use an Inspector General record in support of a relief from duties action will coordinate with the Office of the Inspector General prior to initiation of that action. There was no record that such a request was made by the Adjutant General for release of inspector general records for that purpose. The Office of the Inspector General is the proponent agency and the "appropriate authority" to state that AR 20-1 was violated by the agency. The letter of 7 March 1989 from the Office of the Inspector General should serve as the agency's admission that Petitioner was the recipient of an unwarranted personal action thereby allowing a suit for back pay to lie.

CERTIFICATE OF SERVICE .

I hereby certify under penalty of perjury that on this 4th day of August 1989, I caused to be placed in the United States mail (first-class, postage prepaid) three copies of Petitioner's SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT addressed as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

4 August 1989

Elmer R. Barbee

Elmer R. Barbee

Attorney, Pro Se.

May 30, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On March 7, 1989, I sent you a final reply to your February 1, 1989, Army Inspector General Action Request (IGAR). Your IGAR focused on allegations of retribution which you felt violated the June 15, 1978, version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures. My reply contained several findings about AR 20-1 and the removal action taken against you.

Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard", did not become effective until February 15, 1980, when Change No. 1 to that version of AR 20-1 was implemented. No National Guard regulations or other National Guard Bureau (NGB) publications existed between June 15, 1978, and February 15, 1980, which made AR 20-1 applicable in whole or in part to members of the ARNG while not in the active Federal service of the United States.

Since the provisions of Ar 20-1 cited in my March 7, 1989, letter did not apply to your October 24, 1979, IGAR and the State Inspector General's November 12, 1979, report of investigation concerning your allegations, my final reply to your IGAR was incorrect. I offer no opinion on the applicability of North Carolina laws or state regulations to your case.

Additionally, I have reviewed your May 5, 1989, letter concerning your disagreement with the North Carolina Adjuntant General's April 25, 1989, letter to you. Unfortunately, for the above mentioned reasons, I am unable to pursue this matter further. I regret any inconvenience this may have caused you.

Sincerely,

Marcia Rinkel

Colonel, Inspector General

Chief, Assistance Division

8 June 1989

Department of the Army
Office of the Inspector General
COL Marcia Rinkel
Chief, Assistance Division
Washington, D.C. 20310-1700

Dear COL Rinkel:

On 8 June 1989, I received your letter of 30 May 1989. In that letter you stated that my Inspector General Action Request (IGAR) focused on allegations of retribution which I felt violated the June 15, 1978 version of Army Regulation (AR) 20-1, Inspector General Activities and Procedures.

My original IGAR to your office involved what I felt were violations of the 15 January 1980 version of Army Regulation (AR) 20-1. My IGAR involved the "Proposed Adverse Action (Removal)" letter written by Major Leslie T.

Everett and presented to me on 22 February 1980. On 15 February 1980, one week prior to the initiation of that adverse action, Change 1 of the 15 January 1980 version of Army Regulation (AR) 20-1 became effective and applicable for the Army National Guard. Therefore, your office was the appropriate authority to state that there was no basis for the adverse action taken against me. There was never a question as to the validity of the Inspector General Investigation nor the ROI of 12 November 1979.

In that all of those provisions of the 15 June 1978 version of Army Regulation (AR) 20-1 were incorporated in Change 1 of Army Regulation (AR) 20-1, dated 15 January 1980, your letter of 7 March 1989 is still valid. I respectfully request that your office revise your 7 March 1989 letter to

reflect the correct version of. Army Regulation (AR) 20-1, dated 15 January 1980, which was in effect at the time the violations occured, and again state that there was no basis for an adverse action to have been taken against me.

Thanking You in Advance,

Elmer R. Barbee, LTC.

18 June 1989

Department of the Army
Office of the Inspector General
COL Marcia Rinkel
Chief, Assistance Division
Washington, D.C. 20310-1700

Dear COL Rinkel:

Today I conversed by phone with COL Williams of the Office of the Inspector General about the 8 June 1989 letter that I sent to you. I understand that the Inspector General Action Request (IGAR) of that date was forwarded to the Department of the Army, Legal Branch, for a response. I further understand that there is a legal question as to whether or not the 15 June 1978 version of AR 20-1 was considered by the North Carolina Army National Guard to be applicable when the October and November 1979 Inspector's General Investigation

was conducted. To that question, I would like to submit the following:

The Technician Personnel Act. 32 USC 709 (d) states "A technician employed under subsection (A) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." ..... It is clear therefore that I had the right to register my complaints orally or in writing with an Inspector General IAW paragraph 3-3 of AR 20-1 dated 15 June 1978. My complaints were rendered while I was in a technician status, or as a civilian on duty with the Department of the Army, or as defined in 5-1b, in the active Federal service of the United States. I was a National Guardsman only on drill weekends and for two weeks of summer camp each year. The rest of the time I was a civilian employee with the

Department of the Army and was in the active Federal service of the United States.

Your letter of 30 May 1989 states that: "Upon further legal review of this matter, it is clear that the provisions of AR 20-1 cited in my March 7, 1989, letter did not apply to your case.

The June 15, 1978, version of AR 20-1 had a provision in paragraph 5-1b which said, "Army regulations do not apply to the ARNG except where specifically made applicable or where made applicable in whole or in part by National Guard Bureau publications." Paragraph 1-2, Applicability, which said, "This regulation applies to the Active Army, the U.S. Army Reserve and the Army National Guard" did not become effective until February 15, 1980, when

Change No. 1 to that version of AR 20-1 was implemented....." Upon close review of the 15 June 1978 version of AR 20-1, paragraph 1-2 Applicablitiy was non-existent, and so therefore based on this latest interpretation apparently the 15 June 1978 version of AR 20-1 did not apply to the Active Army either.

The 15 June 1978 version of AR 20-1 paragraph 1-2, statutory authority, does however state that: "Title 32, United States Code, Section 105, provides for inspection of the Army National Guard (ARNG) and for the conducting of investigations of the ARNG on matters having Federal concern." Again, it is clear that not only did the 15 January 1980, but also the 15 June 1978 version of AR 20-1 was applicable to the ARNG as well as civilian personnel on duty with the Department of the Army.

Appendix I is the Department of the Army (DA) Form 1559 signed by me on 24 October 1979 and is an Inspector General Action Request. This form clearly states that AR 20-1 is the appropriate regulation, and further states that the proponent agency is the Office of the Inspector General. If the ARNG inappropriately utilized this form, that is a problem for the proponent agency, being your office, not me being a requestor of assistance. The validity of the Inspector General Investigation of October-November 1979 has never been questioned. The ROI dated 12 November 1979 has never been in question. The only area of concern was the Adverse Action proposed by Major Leslie T. Everett on 22 February 1980, After the implementation of the 15 January 1980 version of change 1 to AR 20-1.

Appendix II is page 399 of my Civil Service Hearing conducted July 1980. This page is sworn testimony by Major Leslie T. Everett stating that he at no time prior to initiating the proposed adverse action of 22 February 1980, saw or had access to Inspector General records. He further stated that as of 10 July 1980 he had not had access to Inspector General reports or records.

Appendix III is a Memorandum for Record prepared by the Adjutant General on 28 November 1979. This memorandum indentifies the investigation as that of an Inspector General, and clearly does not indicate that I knowingly made false statements during the investigation or in the presence of the Adjutant General. In fact the Adjutant General was in complete agreement with findings of the investigation and considered it closed

with the exception of the Adverse Action prepared against COL Guard.

Appendix IV is a letter of 11 March 1980 signed by Major Leslie T. Everett. Paragraph 4 of that letter states that COL Nielsen, the Inspector General cited AR 20-1, dated 15 June 1978, as the authority to release to Major Everett his copy of DA Form 3881.

Appendix V is a letter by me of 26 March 1980 requesting IAW AR 20-1 paragraph 1-12, e, dated January 1980, copies of my testimony presented during the Inspector General's Investigation of October and November 1979. Appendix VI is the response provided by Charles R. Nielson, COL. I. G., State Inspector General, Again AR 20-1 is acknowledged and utilized as the appropriate authority for release of Inspector General Records.

Appendix VII is sworn testimony by COL Charles R. Nielsen during my Civil Service Hearing of July 1980. His testimony states that AR 20-1 and TBIG's were used to conduct his investigation, and that no statements made by me were found by him to have been false.

Appendix VIII is a letter of 6 April 1981, sent to Representative Charles O. Whitley by COL William Keeton, NCARNG, Chief of Staff. This letter uses Army Regulations to totally deny a request by a member of Congress for Inspector General records.

Appendix IX is a letter dated 21 June 1982 addressed to me from Senator John P. East. Senator East provided me a letter of 17 June 1982 signed by COL John D. Stuckey, NGB, stating that your office was the releasing authority for Inspector General reports. In inquiring

to your office I was referred to Office of the Adjutant General of North Carolina.

Finally, Appendix X is a reply, addressed to me, dated 24 August 1982, signed by the Senior Deputy Attorney General of North Carolina, Andrew A. Vanore, Jr. Mr. Vanore is also a COL in the NCARNG and was a senior JAG officer for the Adjutant General. In paragraph 4 of his letter he cites AR 20-1 as prohibiting the release of the entire Inspector General's report.

As you can see, the validity of the Inspector General ROI of 12 November 1979, and the application of AR 20-1 has gone full circle. All agencies concerned have indicated that AR 20-1, by either date, was applicable to the ARNG. AR 20-1, by either date, was utilized by NCARNG, NGB, and the

Department of the Army to deny Congressmen and Representatives, both State and Federal, access to Inspector General records in their attempts to assist me in resolving this matter.

FORSCOM Supp 1 to Ar 20-1, dated 16 August 1978, provides for adding to AR 20-1, dated June 1978 subparagraph d to page 1-11, paragraph 1-13, Training. Section (2)(a) states: "Army National Guard and Army Reserve officers detailed as Inspectors General may be nominated to attend courses of instruction under quotas administered by Chief, National Guard Bureau, and HQ FORSCOM respectively, (b). Nominations of ARNG personnel are submitted by State Adjutants General to the Inspector General of the Army through Chief, National Guard Bureau." Paragraph (e) placed the responsibility for the funding and issuance of travel orders

for ARNG on Chief, National Guard Bureau, 2 a. It is clear that the Office of the Inspector General received funds from National Guard Bureau for the purpose of training Inspectors General for the ARNG. How else could ARNG Inspectors General perform their duties if not in accordance with AR 20-1 and TBIG's?

On 24 April 1989, I filed with the Supreme Court, a petition for writ of Certiorari. This is only a petition, and is not a matter of litigation with the Department of the Army. The Solicitor General's Office requested and obtained a thirty day extension in order to confer with the Department of the Army and with National Guard Bureau. Apparently this conferring was not limited to the Department of the Army and National Guard Bureau in that legal representatives from their respective

offices and from the Solicitor General's Office were allowed contact your office direct and convince you that your letter of 7 March 1989 was incorrect in that the 15 January 1980 version of AR 20-1 was not cited.

I am respectfully and formally initiating this Inspector General Action Report Request of your office to provide to me a corrected copy of your 7 March 1989 letter citing the 15 January 1980 version of AR 20-1 which was in effect prior to the issuance of the Proposed Adverse Action (Removal) letter dated 22 February 1980. In that your 30 May 1989 letter, stating that your 7 March 1989 letter was incorrect, was not prepared until after my petition for writ of Certiorari was submitted to the Supreme Court, I am sure there is no policy statement that forbids your office from issuing a corrected letter.

Thanking you in Advance,

LTC Elmer R. Barbee

DA FORM 1559 signed by

Elmer R. Barbee on

24 October 1979

APPENDIX I

For use of this form, see AR 20-1; the proponent agency is the Office of the Inspector General and Auditor General.

INSPECTOR GENERAL ACTION REQUEST

For use of this form, see AR 20-1; the proponent agency is the Office of The Inspector General and Auditor General.

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY: Title 10, USC, Section 3020.

PRINCIPAL PURPOSE: To assess sufficient information to make inquiry into the matters presented and to provide a reference to the instrument(s) and/or item number to answer deficiencies.

ROUTINE USES: Information is used for official purposes within the Department of Defense to answer complaints or respond to requests for assistance, advice or information by Members of Congress and other Government agencies which considered by The Inspector General and Auditor General to be in the best interest of the Army; and in certain cases is used by governmental or other military matters as authorized by the Uniform Code of Military Justice.

DISCLOSURE OF THE SOCIAL SECURITY NUMBER AND OTHER PERSONAL INFORMATION IS VOLUNTARY. HOWEVER, FAILURE TO PROVIDE COMPLETE INFORMATION MAY HINDER PROPER IDENTIFICATION OF THE REQUESTOR, ACCOMPLISHMENT OF THE REQUESTED ACTION(S) AND RESPONSE TO THE REQUESTOR.

LAST NAME – FIRST NAME – MIDDLE INITIAL	GRADE	SSN	DUTY TELEPHONE
BARNES, ELMER L.	04	241-74-3923	733-5069

COMPLETE PRESENT MILITARY ADDRESS (If not military, show current civilian address, including ZIP Code)

AASF #1 PO Box 1, Morrisville, NC 27560

SPECIFIC ACTION REQUESTED

Accusations against CPT Bruce C. Conrd and Major Leslie Bowyer as follows:

INFORMATION PERTINENT TO THIS REQUEST (Give additional names if necessary and dates/places if applicable)

CPT Conrd - (1) is incompetent, (2) that CPT Conrd harrasses him, on and off the job, and (3) that he totally abuses his position as Commander of both the Flight Facility and new State Aviation Office.

MAJ Bowyer - (1) He is incompetent in his position, (2) that he uses his position to harrass MAJ Barnes personally, and (3) that there is gross negligence on the part of both parties against MAJ Barnes.

This information is submitted for the base purpose of requesting assistance, correcting injustices affecting individuals, or eliminating conditions considered detrimental to the efficiency or reputation of the Army. I fully understand that I may be held accountable for any statements which are proved to be knowingly untruthful.

DATE	SIGNATURE
24 October 1979	Elmer L Barnes

EXHIBIT BB

DA FORM 1559 REPLACES EDITION OF 1 MAY 72, WHICH IS OBSOLETE.

Sworn Testimony by

MAJOR Leslie T. Everett, Jr

Civil Service Hearing

July 1980

APPENDIX II

Another reason that there was a delay between 25 October and 22 February was compassion. I have a compassion for Elmer Barbee's family, his wife and kids. To be quite frank about it, I have none for Elmer Barbee.

Another reason in reviewing in my mind what the Adjutant General told me, I wanted to see if it would work. Could Elmer and I work together in a reasonably harmonious and effective relationship for the good of the North Carolina National Guard, regardless of my own personal feeling or regardless of Elmer Barbee's personal feelings.

Another reason for the delay was that I asked Colonel Huie two or three times for written confirmation of clearance by the Inspector General. I consider myself a professional. I consider myself a human being. If

anyone makes accusations and charges against me and they put them in writing, I feel like I have a right to those findings in writing. I did not request anything from the written Inspector General report nor have I had access nor have I seen anything from the Inspector General's report. My counsel has obviously asked me questions that he feels are pertinent to the report, but I have not seen the report, then or now. That was a fourth reason.

The fifth reason is -- and incidentally, on the third time I asked Colonel Huie, I think it was the third time, he said, "Why do you want the written confirmation?" or words to that effect. I told him two things. One, I am entitled to it.

MEMORANDUM FOR RECORD

Prepared by AG William Ingram

28 November 1979

APPENDIX III

AG 28 November 1979

MEMORANDUM FOR RECORD

SUBJECT: Allegations made by MAJ Elmer Barbee against COL Bruce Guard and MAJ Leslie Everett

I informed MAJ Barbee this date that the NCARNG Inspector General had completed his investigation into the allegations made by himself. I informed him that his was a most thorough investigation and that I was in complete agreement with the findings.

I informed MAJ Barbee that the findings did not substantiate any of his allegations against MAJ Everett and that I considered that portion of his allegation closed.

I informed MAJ Barbee that the investigation substantiated only one (1) of his allegations made against COL

Guard and that I was taking appropriate action in that regard and considered his other allegations closed.

At this point, I counseled MAJ Barbee on my feelings as they pertained to his outlook toward his working associates. I advised him that as a layman only, it appeared to me that he continually misunderstood his superiors' motives and recommend to him that he should seek counseling to determine if my observation was correct and that if confirmed, he should seek professional treatment of this problem.

WILLIAM E. INGRAM
Major General, NCARNG
Adjutant General

Letter by Leslie T. Everett

Dated 11 March 1980

APPENDIX IV

AASF #1 11 March 1980

SUBJECT: Requested Information
(Proposed Removal Action)

Major Barbee
Aircraft Maintenance Officer
Army Aviation Support Facility No. 1
Morrisville, NC 27560

1. Reference your letter dated Mar 80 on above subject.

2. The material relied on to support my position in my recommendation for your removal is the fact you made sworn charges against me (personal harassment and job incompetence) against me (your supervisor) and as a result of an extensive Inspector General Investigation the charges were determined to be totally unfounded and unsubstantiated.

3. The reference material relied upon for my authority to make such a recommendation is contained in Technician Personnel Pamphlet (TPP) 904, Appendix A (General Guide of Penalties for Delinquency or Misconduct), page A-4, offense #14.

4. After my verbal request to COL Huie for the statement of charges against me was made, COL Huie asked COL Nielsen for authority for the document to be given to me. This was granted and authority for same is given under AR 20-1 dated 15 Jun 78.

5. Attached hereto is certification of findings made in regards to charges intitiated against me in the IG investigation.

6. As to your request in para 2c of your letter, this letter concludes the "any and all statements, material or

further documentation" that I have for submission to you.

Incl as

LESLIE T. EVERETT, JR.
MAJ, AR, NCARNG
Commander, AASF #1

AG 11 March 1980

MEMORANDUM TO MAJOR LESLIE T. EVERETT, JR.

SUBJECT: Inspector General Investigation

At your request, this written memorandum confirms verbal exoneration of 28 November 1979 from all charges lodged against you by Major Elmer R. Barbee in recent Inspector General investigation.

WILLIAM E. INGRAM
Major General, NCARNG
Adjutant General

Letter by Elmer R. Barbee

Dated 26 March 1980

APPENDIX V

26 March 1980

SUBJECT: Request for Copy of Transcript; Inspector Generals Investigation Oct-Nov 1980

Inspector General
State Of North Carolina
Department of Crime Control and Public Safety
ATTN: COL Neilsen
P.O. Drawer 26268
Raleigh, North Carolina 27611

1. IAW Ci AR 20-1, Paragraph 1-12, e, dated January 1980, I am requesting a copy of the transcript of my testimony presented during the Inspector General's Investigation of October and November 1979. This was the investigation involving COL Bruce C. Guard, Major Leslie T. Everett Jr. and myself. Along with the transcript of testimony, I further request copies of all documents

pertaining to the investigation signed by me.

2. Please provide the requested information in person to me or mail it to me at P. O. Box B, Morrisville, North Carolina 27560. I appreciate your time and interest and if I can provide any further information, please contact me at 733-5069.

CF COL Beale

ELMER R. BARBEE
MAJ AR NCARNG
Aircraft Pilot Supervisor

Letter by I.G. Charles Nielsen

Dated 28 March 1980

APPENDIX VI

AGONG-IG 29 March 80

COL Earl B. Hule
Chief of Staff
North Carolina Army National Guard
Post Office Box 26268
Raleigh, North Carolina 27611

SUBJECT: MAJOR ELMER BARBEE
INVESTIGATION

1. The attached letter was hand-delivered to me on 26 March, 1980.

2. MAJ Barbee's request is in keeping with AR 20-1.

3. Photocopy the Form 1559 signed by MAJ Barbee and all pages of his testimony. MAJ Barbee's testimony was in two (2) parts.

4. Have MAJ Barbee come to your office and receipt delivery of the items noted in paragraph 4 above.

Charles R. Nielsen

COL, I.G.

State Inspector General

CF - MAJ Barbee

Sworn Testimony by

Col. Charles R. Nielsen

Civil Service Hearing

July 1980

APPENDIX VII

Mr. Twiggs wants to challenge the thoroughness of the investigation, he may do so. But it certainly should be accepted, if not for the truthfulness of everything in there, but to establish that a thorough investigation was in fact conducted by Colonel Neilsen.

You stated in your ruling yesterday that with respect to matters of opinion, the weight given to such opinions depended in part on the expertise of the person stating it. I suppose that expertise must in turn be based upon the person's reasonable opportunity to form an opinion. I say, therefore, that this investigation is offered to show that the opinions stated by the Inspector General are based on a thorough investigation of the charges.

HEARING EXAMINER COLEMAN: Let the record show that counsel for the

appellant objected to it being entered at this time. But we will go ahead and enter it based on counsel for the Agency's proposal.

(The documents referred to were marked as Exhibit 18 and received in evidence.)

HEARING EXAMINER COLEMAN: Are you ready to proceed?

CROSS EXAMINATION

BY MR. TWIGGS:

Q Colonel Nellsen, I don't believe they asked you where you reside. May I ask where you reside, sir?

A Kinston, North Carolina.

Q Your official duty with the National Guard in this position that you now hold is as the State Inspector General?

A That is correct.

Q You were called by General Ingram in this case to conduct an investigation as the Inspector General. Is that correct?

A To be specific, General Ingram told Colonel Huie to call me. But it amounts to the same thing. He directed that an investigation be done.

Q By you as the Inspector General in North Carolina?

A That is correct.

Q Now, in the beginning of your investigation, I would like to point to one of the exhibits that you referred, which is the exhibit that is dated October 24, 1979. Did you prepare this document for Major Barbee to sign?

A He did it in handwriting and then I had the stenographer type it and brought back to Major Barbee on the second recall and asked him to look at the

typed one. If it was agreeable, would he sign it? He did and it was signed.

Q And it was signed other than handwritten in this same form and on the same form back on the 24th and then was later resigned for record purposes.

A That is correct. It was just for record purposes. I think the reason why is my handwriting is not the clearest

Q Mine isn't either, Colonel. I sympathize with that. Sir, this is in evidence and it has been admitted in evidence as one of the exhibits. It is Exhibit BB. So it's before the body. This time, Mr. Smith has seen it.

This form is an Inspector General Action Request. That is the title of the form.

A That's correct.

Q Also, on the form, it says for use of this form see AR 20-1. Is that correct?

A That is correct.

Q Let me hand you AR 20-1 for identification purposes. AR 20-1, for identification purposes, is the Inspector General Activities and Procedures for Inspections and Investigations.

A That is correct.

Q The AR 20-1 also applies in 1.2, "This regulation applies to the Active Army, the United States Army Reserve and the Army National Guard.

A That is correct.

Q You were giving him this form to sign in respect to AR 20-1 as a member of the Army National Guard.

A That is correct.

Q The warning, if I can call it that, stated and printed on the bottom is "This information is submitted for the basic purposes of requesting assistance, correcting injustices affecting

individuals or eliminating conditions considered detrimental to the efficiency or reputation of the Army. I fully understand that I may be held accountable for any statements which are proved to be knowingly untruthful."

A That's correct. Mr. Twiggs, if I might state, the reason why this form was used was I felt I had to protect every person involved. This statement here was for the reasons for Everett and Guard as well as Barbee.

Q All right. And this statement, of course, protects Major Barbee from any information that he gives to you in your capacity as Inspector General, unless those statements are knowingly untrue. Is that correct.

A I do not know. "Knowingly"?

Q Isn't that what the form says?

A That's what the form says, yes.

Q I hand you now AR 20-1 also, Chapter 3 Section 34. I will ask you, sir, if you will, to read that into the record for me first.

A That is on page 3-2, paragraph 3-4, "Liability of Individuals Knowingly Making Untruthful Statements: Any person on duty with the Department of the Army who under the guise of presenting a legitimate complaint to the Inspector General knowingly makes an untruthful statement will be subject to disciplinary action. The appropriate commander will be informed promptly of the details of any such incident."

Q Colonel Neilsen, does it not appear to you that the form that Major Barbee signed concerning being "held accountable for any statements which are proved to be knowingly untruthful" was in effect taken from Section 3-4 of AR 20-1?

A Are you asking me if this is a synopsis of that paragraph?

Q Yes.

A It is, basically, yes.

Q I ask you now, if you will, to look at Section 3-3, refering back to Section 3-4, and if you will read Section E, which is on page 3-2 and is a portion of Section 33, please, into the record.

A Paragraph E: "Any type of disciplinary or other adverse actions against an individual for registering a complaint, except as provided for in paragraph 3-4, is prohibited."

Q All right, sir. That is your understanding of the protection given to an individual who signs a form DD 1559, which is Exhibit BB, which Major Barbee signed in this action. Is that correct?

A That is correct.

Q Do you have a copy of the transcript in front of you, sir?

A You have taken it away from me.

Q The transcript? Oh, I'm sorry; it's in evidence. When you said I had it, I thought you meant I had it.

A No, "you", the Court.

Q In connection with AR 20-1, Section 3.3 and the form Major Barbee signed, I ask you to turn please, if you will, to page 62. At the bottom of the page, in the last question, I will ask you if near the conclusion, being on the next to last page of your first interview with Major Barbee, if you did not in your capacity as Inspector General inform him, "I want to tell you again that the information that you have given to me is confidential. The exhibits you have given me will be part of the record. At the time that I have completed my investigation, I will report to General Ingram and I will tell him my conclusions and recommendations."

That is the statement, of course,. that you made to him.

A That's right and that is right out of the IG's record book. We have a format for the protection of the individual and all concerned.

Q And that is from 20-1?

A No, it's not. It is from the TBIG folder, Training Bulletin for the Inspector General. They have a format for questioning indiviuals and to make sure that the rights of the individuals are covered.

Q All right, if you will turn to the next page, please. The second sentence, "the information". This of course refers to the information that you obtained. "The information will be placed in a sealed file and will not be divulged to other people. The information that you have given me, I want to remain confidential." That is

also from your duties as Inspector General, not to make material given to you common knowledge.

A That's correct. The Inspector General's system is that he is the commander's agent. I am the agent of the Adjutant General. What I do is given to him for whatever he wants to do with it. He can throw it out the window or he can take severe action or he can take mediocre action and so forth.

Q That's true of all investigations. The Inspector General actually conducts for the -- Is that correct?

A It's for his commander.

Q All right, it's for his commander.

A We have other inspector generals who are at lower echelons.

Q All right, sir. Now, I will ask you please to look --if we handed it back to you. If we haven't I apologize. I don't think we have. I am handing

back to you the formal recommendation made and dated 12 November, 59. I think that is the one which has been admitted, the excised portion being excluded.

Concerning the evidence, you found that the testimony on page 2, number 6A, of Major Barbee did not prove the allegations as stated in 5A-1 and 2 against Guard and Everett.

A That is correct.

Q "Did not prove" were the words that you used in this respect.

A That is correct.

Q Under the portion remaining B on page 3 concerning Major Everett, your report states that "sworn testimony does not substantiate Barbee's accusations." "Does not substantiate" of couse is the language you used in that report.

A That is correct.

Q That was correct. Concerning discussion on page 4, number 7, refering

to dissatisfaction, "Major Barbee's primary reason for dissatisfaction and his allegations stem from his non-selection as facility commander and are further reinforced by his grounding by Major Everett. The allegations again cannot be proven, except for civilian work of Guard, but can be rationalized when taken in the context of a subordinate and a commander." You said there that these allegations simply could not be proven. Isn't that correct?

A That's correct.

Q Nowhere in your recommendations, turning please to page 6, did you use the word "false" concerning the information given to you by Major Barbee, did you, sir? If you will look at that, sir.

A Let me read the rest of the page.

(pause.)

No, I don't think I used the word "false" at all. I do not find it.

Q So your use of "false" when you described the information that Major Barbee gave you earlier, what you are referring to actually is that the allegations could not be proven and not that certainly Major Barbee was lying to you when he answered your questions?

A Now you are asking for my assumption now. Is that correct?

Q Well, I am asking --

A If you are, I would like to make some statements regarding that.

Q All right, I will ask you. I think you are entitled to do that.

A In the testimony, there are certain parts in here that I felt tended upon being false, but I could not prove it.

Q You could not prove they were false.

A I could not prove they were false. But other testimony led to it, but just didn't open the door to me. I am not a refined educated investigator. I am the Inspector General because of my experience in the National Guard and that is the way other Inspecotr Generals are.

Q Colonel, I think you did a good job in your investigation. I don't think you have to apologize for it frankly. And I think your questioning was excellent.

A Well, I feel like there were some points in there that should have been taken further.

Q All right. I can go through the testimony with you page by page, item for item, and I can ask you if you thought at the moment when he answered your question, if he was intentionally lying to you or stating untrue

statements. Now would you be able to answer any of those questions in that manner?

A No. I cannot find any untrue statements. In fact, I stated "in his mind".

Q Yes, "in his mind".

A I said that someplace in there.

Q Yes, I know you did.

Colonel, if you would turn to page 202. This was when you were of course asking him questions near the completion of the second interview with him. I think Mr. Smith referred to most of those questions, beginning about the middle of the page. You asked the question, "Did you ever make a statement to some of the personnel that it appears to you that if you were going out of the National Guard you are going to take some people with you?" He answered, "Yes sir, I did make that statement at

Letter by COL Wm. Keeton, Jr.

to the Honorable Charles O. Whitley

Dated 6 April 1981

APPENDIX VIII

AGONC-AGCS 6 April 1981

Honorable Charles O. Whitley
House of Representatives
Washington, D.C. 20515

Dear Mr. Whitley:

Reference is made to your letter, 31 March 1981, concerning a request made by Major Elmer R. Barbee for a copy of an uncensored report of the investigation of his case.

I have consulted our legal counsel in the Office of the State Attorney General, and he has confirmed that the request must be denied in accordance with existing Army Regulations and the Privacy Act.

Sincerely,

WILLIAM P. KEETON, JR.
Colonel, GS, NCARNG
Chief of Staff

Letter by U.S. Senator John East

With Attachment Dated

21 June 1982

APPENDIX IX

June 21, 1982

Mr. Elmer Barbee

Post Office Box 97

Manchester, Kentucky 40962

Dear Mr. Barbee:

I have received the enclosed letter from the National Guard Bureau in Washington, D.C. reguarding my inquiry on your behalf. I know how interested you are in this matter.

I trust the response is self explanatory and beneficial to your inquiry.

Please continue to keep me apprised of any concerns you have and do not hesitate to let me know whenever I may be of service.

Sincerely

John P. East

United States Senator

JPE:lb

Enclosure

NGB-PO 17 June 1982

Honorable John P. East
United States Senate
PO Box 25009
Raleigh, NC 27611

Dear Senator East:

This is in reply to your inquiry in behalf of Elmer R. Barbee who communicated with you recently requesting your assistance in obtaining an Inspector General's report from North Carolina.

The Office of the Inspector General, Headquarters, Department of the Army (DAIG-ZXF), Washington, D.C. 20310, is the releasing authority for Inspector General reports. Accoringly, Mr. Barbee should submit a written request to that office for a copy of the report he desires.

I hope this information will be helpful.

Sincerely,

Incl

JOHN D. STUCKLEY

CC: TAG NC

Chief, Office of Policy and Liason

Letter by Andrew Vanore, Jr.

Dated 24 August 1982

APPENDIX X

24 August 1982

Mr. Elmer R. Barbee

Post Office Box 97

Manchester, Kentucky

40962

Dear Mr. Barbee:

I reply to your letter of 9 August 1982 addressed to the Office of the Adjutant General of North Carolina, requesting copy of the original investigative report filed by the Inspector General. This Inspector General report was filed with the Adjutant General in 1979 and was based on certain complaints that you had initiated.

As you pointed out in your letter, you and your attorney were furnished with as much of the Inspector General's report which ethically and responsibly could be made available. For obvious reasons, Inspector General's reports contain information of a privileged nature, the

confidentiality of which must be maintained.

Mr. Barbee, you had your day in court. You were represented by most competent counsel. Although you did not concur with the results, you were provided every benefit allowable under law.

In my opinion, Army Regulation 20-1 prohibits the release of the entire Inspector General's report. As you are very much aware, when an Inspector General conducts an investigation, he speaks to many individuals on a very confidential basis and these individuals are, for obvious reasons, assured of the confidentiality of their comments. You and your attorney were afforded as much of the report as could ethically and legally be made available to you.

By copy of this letter, I am advising Senator East that I will be happy to personally discuss this matter,

including the Inspector General's report with him or any member of his staff.

Very truly yours,

RUFUS L. EDMINSTEN

Attorney General

Andrew A. Vanore, Jr.

Senior Deputy Attorney General

AAVjr:js

cc: Senator John P. East

General William E. Ingram

Col. William P. Keeton, Jr.

July 5, 1989

Assistance Division

Lieutenant Colonel Elmer R. Barbee
Post Office Box 130
Manchester, Kentucky 40962

Dear Colonel Barbee:

On the advice of the Department of Justice, while the matter of your allegations is in litigation, no further substantive response will be given by this office.

Sincerely,

Marcia Rinkel
Colonel, Inspector General
Chief, Assistance Division